The Court below did not so hold; on the contrary, it held the exact opposite. The opinion states:

> "Both principles may be recognized in the case at bar by holding that the Red Cross Act gives the petitioner the right to continue to use the Red Cross words and symbol but the Federal Trade Commission Act empowers the respondent to prevent their use in a deceptive manner."

The Court referred the case back to the Commission for further proceedings in accordance with the opinion, stating:

> "We do not ourselves attempt to formulate the new order because our recent decisions have held that the measure of the necessary relief is peculiarly within the competence of the Commission."

Obviously, if the Court had decided that the prior users were exempted from the prohibition of the Federal Trade Commission Act, it would have set aside the order of the Commission and dismissed the proceeding. The Commission had held in its findings and argued in the Court below that the amendment of 1938 to the Federal Trade Commission Act in effect repealed the proviso of the Red Cross Act of 1910; and that, in applying the amended Federal Trade Commission Act, it could completely ignore the Red Cross Act. The Court upheld the Commission in holding that it could proceed under the amended Federal Trade Commission Act but reversed the Commission in holding that the proviso of the Red Cross Act was repealed in effect and could therefore be completely disregarded. Hence, as the Commission had proceeded upon an erroneous construction of the law, the Court employed the practice, approved and followed by this Court, of remitting the case to the

Commission for further action in accordance with the opinion. The Commission made no attempt to proceed further to reconsider its findings or order in the light of the opinion, but at once applied to this Court for certiorari.

## Specification of Errors

When it comes to specifying the errors that the Court below is alleged to have made, the Commission shifts its ground. Here it says that the Court erred in holding that the Red Cross Act gave a right of continuing use "which prevails against the specific prohibition by the Federal Trade Commission Act as amended", and that the Federal Trade Commission Act does not empower the Commission "to grant relief against such unfair or deceptive acts and practices by forbidding the use of the words 'Red Cross' and its symbol".

Thus the Commission first stated the issue to be whether a pre-1905 user is exempted from the operation of the Federal Trade Commission Act by virtue of the provisions of the Red Cross Act. Now it has reframed the question to be whether the Red Cross Act limits the quantum of relief to be given under the Federal Trade Commission Act to the extent of forbidding prohibition.

The reframed question has not arisen and may never arise. The Court below held:

> "two statutes dealing with related subject-matter should, if possible, be so construed as to give effect to both."

The Commission has never considered whether it could apply the Federal Trade Commission Act without absolute

and immediate prohibition, as it has proceeded only on the erroneous understanding of law that it could completely disregard any rights of the pre-1905 users under the Red Cross Act. If the Commission, upon taking further proceedings, finds that both Acts can be given effect, then the question set forth in the specification of errors will never arise. The question of the supremacy between the two statutes does not arise unless and until they have been found to be completely irreconcilable, i.e. that the Commission cannot perform its duties under the Federal Trade Commission Act without complete and immediate prohibition.

We do not believe that the Commission need so find but, if it should, it would be our position that Congress has given the pre-1905 users of the red cross words and symbol the right to continue the use until such time as Congress shall qualify or terminate such right; and that Congress has given the Federal Trade Commission power to prevent the misuse or abuse of that right, but not the power to terminate it, i.e., it has the power to regulate but not to terminate.

**Statement**

This case presents only the naked question of mere use of the red cross words and symbol, and no question of misuse or abuse. In view of the frequency with which the Commission's brief uses the general expression "deceptive acts and practices", it is important to note just what the respondent is charged with having done. There is no charge, there is no evidence and there is no finding that respondent did other than merely use the trade-mark that it adopted in 1897; and there is no suggestion that by any other act or deed on its part it did anything to induce anyone to believe

there was any connection between it or its products and the American National Red Cross. In fact, the respondent took certain steps to rebut any such belief, but the Commission found them to be insufficient (R. 47, fol. 141). The findings of the Commission went no further than to find a "tendency and capacity to mislead and deceive" (R. 49, fol. 146).

It appears that there now remains only a small handful of pre-1905 users of the red cross words and symbol, within the proviso of the Red Cross Act.[1] The Commission after starting this proceeding against respondent started similar proceedings against others of this group but these other cases have been held in abeyance, presumably awaiting the outcome of the present case. We presume that the selection of this respondent for the first case was made upon an alphabetical basis, as it is stated in the application for certiorari that the decision by this Court will govern the application of the Trade Commission Act to all pre-1905 users.

## Red Cross*

The words "red cross" have been in common usage for centuries. The Oxford English Dictionary gives both "red cross" and "red-cross". The definition appears in the Record at pages 435 to 437, showing the use going back over the centuries and the first definition as the national emblem

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[1] There is evidence in the Congressional hearings that the number is only six (Hearings before the House Committee on Foreign Affairs on S. 469, p. 60); but we understand the brief *amicus* being filed indicates that something under ten pre-1905 users are still using the mark.

*The facts on this matter are only summarized here, in view of the full treatment in the brief *amicus curiae*.

of England—St. George's cross. "Red cross" is also found in Webster's American Dictionary, in the 1860 and earlier editions.

The first Convention in Geneva was held in 1864 and was entitled a Convention "for the amelioration of the wounded in armies in the field". In it the words "red cross" appear but once. In Article VII there is this sentence: "The flag and the arm-badge shall bear a red cross on a white ground" (22 Stat. at Large 940, 944).

In the longer supplementary Convention of 1868, the words appear only twice, namely in Articles XII and XIII, which provide that hospital ships and ships claiming neutrality under the Convention shall, together with their national flag, have a "white flag with a red cross". It is also provided that "military hospital ships shall be distinguished by being painted white outside with green strake" (Ibid, p. 949).

It will be noted that neither Convention defined the cross to be used. Such specification did not appear until the next Convention, held in 1906, which provided for "the heraldic emblem of the red cross on a white ground, formed by the reversal of the federal colors", out of respect to Switzerland.

Of course the Greek cross is a symbol that antedated these Conventions by centuries. The Greek cross in red was used by the Republic of Genoa, by England, by the Knights Hospitalers and many others. By association of ideas it had been taken into usage with various connotations, especially with reference to mercy, aid to the sick and wounded, sanitation, purity and the like. The Geneva Conventions did not even purport to create or originate the words or the symbol, but went back to the common pool

and took therefrom the words and symbol that had long before obtained connotations appropriate to the purposes that these Conventions intended to further.

This country was not officially represented at the Conventions of 1864 and 1868, and it was not a party to them. They made so little impression in this country that the United States did not ratify them until eighteen years later —in 1882. Miss Clara Barton says in her own book that she herself did not hear of them until she went to Europe and did not start to make her first effort in this country on behalf of the Geneva Convention until 1877.[2] The so-called "Red Cross movement" was very slow in developing in this country. Respondent's Exhibit 10 (R. 440) is very illuminating. In 1905 the American National Red Cross had only 3,387 members.

There had been in this country a wide use of the red cross as well as other crosses as trade-marks for commercial purposes.[2a] This appears from Respondent's Exhibit 13 (R. 448, *et seq.*). As the first Federal Trade Mark Act was not passed until 1870, the record of registrations in the United States Patent Office, set forth in this Exhibit, could not go back of that date. Also, this list can indicate only part of the use, as it is well known that a large percentage of trade-marks in use were not registered in the Patent Office, especially in the earlier years. It is obvious that during these years business men were using crosses of all shapes and all colors as trade-marks. There is no evident trend to use the red cross and Greek crosses in preference to other colors and other shapes. Business went back into

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[2] "The Red Cross" by Clara Barton, pp. 60-61, 63.

[2a] The red cross had long been used by the Hudson's Bay Company, East India Company and other famous trading companies.

the common pool for symbols and trade-marks, and naturally enough there is no evidence that it was influenced by the Geneva Conventions which were so slow in obtaining popular recognition in this country.

It is significant to note the statement made by Judge Learned Hand in 1911 in *Loonen* v. *Deitsch*, 189 Fed. 487, 489:

> "Does the mark (the red cross) actually mean that the society is in any way concerned with the manufacture of the goods? I think not. We have become familiar with it in the past for many other uses than that of the society though happily such uses will now slowly disappear. It has been used on hospital ambulances, upon medicaments, upon doctors' motor cars, upon barber shops, upon laundries and for military field service not connected with the Red Cross Society. In short, until the legislation of 1905, it had been quite instinctively adopted for many uses which were congruous with the chief objects of the society but which did not indicate that the society had anything to do with them, or certainly with the frequency of the use ceased to do so."

## STATUTORY HISTORY

Congress incorporated the American National Red Cross in 1900, reincorporated it in 1905, with amendments in 1910, and provided for its use as an emblem and badge "a Greek red cross on a white ground". In view of the then-existing commercial usage, there was posed the usual problem of adjustment of public and private rights and equities and it was solved by the usual compromise of using the "grandfather clause".[2] In the interest of the

[2] The Act of 1900 contained no prohibition against commercial use. The prohibition and the "grandfather clause" appeared for the first time in the Act of reincorporation in 1905.

public it was desirable to prevent the confusion and possible deception that might follow if business men could put on their goods the same trade-mark as that of this newly-created organization, but on the other hand those who had properly used it over the years had equities that called for protection. The compromise made it unlawful thereafter to use the words or symbol "for the purposes of trade or as an advertisement to induce the sale of any article whatsoever"; that minimized the problem by eliminating further extensions of the use but maintained the *status quo* by also permitting the then lawful users to continue. The merit of such a compromise is that it carried within itself the potentialities of improvement as business mortality and the vicissitudes of time could be counted on steadily to reduce the pre-1905 users.

For three decades after 1910 all attempts to amend this legislation failed. At the beginning of this decade the expectation of mortality among the pre-1905 users proved to be justified; but on the other hand, the fame and membership of the American National Red Cross have grown tremendously. While the bills introduced in Congress in 1942 were originally under the guise of implementing our alleged obligations under the Geneva Convention of 1929, that aspect, although it loomed large at first, faded out under a critical scrutiny. The elaborate Congressional investigations ranged over a wide field.

The first bills were introduced in the House and the Senate. The House bill (H.R. 6911) was taken up for study and the House Committee had hearings during a period from April 14, 1942 to May 27, 1942 and took over four hundred pages of testimony.[3] It then rewrote the bill

[3]Hearings before the Committee on Foreign Affairs, House of Representatives, 77th Congress, 2d Session on H.R. 6911.

and reported it to the House as H.R. 7420, with a report favoring passage. This bill struck out the proviso in favor of pre-1905 users and it then proceeded to provide:

> "any person, corporation, or association that actually used or whose assignor actually used the Red Cross for any lawful purpose prior to January 5, 1905 * * * may continue to use the Red Cross * * * (1) until July 1, 1944 if such use by such person, corporation, or association would have been lawful prior to the date of the enactment of this act; and (2) during an additional period beginning July 1, 1944 and ending July 1, 1947 in the labeling of any article if" a new trade-mark was joined for the purpose of indicating that the article was formerly identified by the Red Cross.

The report[4] which accompanied this bill first gave the situation as it then existed. It stated:

> "Persons, corporations, or associations that actually used or whose assignors actually used the Red Cross insignia or words for any lawful purpose prior to January 5, 1905, however, *are expressly permitted to continue the use thereof* for the same purpose and for the same class of goods." (Emphasis supplied.)

In explaining the provisions of the bill, the report states:

> "The provisions of the present law which permit certain persons to continue to use the Red Cross emblem and words and the White Cross emblem, without limitation as to time, are eliminated by sections 1 and 2 of the bill. Section 3 of the bill is a temporary provision, and is for the purpose of permitting continued use of the Red Cross insignia or

[4]Report No. 2387, 77th Congress, 2d Session, House of Representatives.

words and the White Cross for specified periods of time.

"* * * The committee is of the opinion that continued use, and sales by manufacturers and producers, should be permitted only for a period of approximately 18 months after the proposed legislation becomes law."

This bill was not reached on the calendar before Congress adjourned at the end of 1942. However, in the meantime the Senate bill (S. 2441) was taken up by the Senate Committee, which proceeded to consider it at length beginning in 1942 and finally filed its report in the Senate on November 15, 1943. The history of the bill appeared at the beginning of the hearings in a statement by counsel for the American National Red Cross[5]:

"I desire at the outset to point out that when S. 2441 was introduced it was in a form which prohibited the commercial use of the Red Cross name and emblem after a period of one year from the date of the passage of the bill. That bill was prepared *by the Department of Justice*, sent to the State Department, submitted by the Under-Secretary of State to the President and sent by the President to Congress with his recommendation for its passage. During the hearings which took place before the House committee, various objections to the S. 2441 provisions were raised and due to various amendments which were offered and adopted by the committee, S. 2441 finally took the form of H.R. 7420, which last bill has had the unanimous approval of the House Committee on Foreign Affairs." (Emphasis supplied.)

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[5]Hearings before a Subcommittee of the Committee on the Judiciary, Senate, 77th Congress, 2d Session on S. 2441 and H.R. 7420, p. 4.

The report[6] of the Senate Committee (of which Senator O'Mahoney was Chairman) stated:

> "It was recognized, however, that there have been good faith uses of the symbol. The bill as reported to the Senate therefore gives an opportunity for commercial users gradually to abandon the use by providing: first, that those who were lawfully entitled to the use of the Red Cross prior to the act of January 5, 1905 for commercial purposes might continue such use until July 1, 1947; second, that during an additional period of 3 years, namely to July 1, 1950, the words or the symbol could be used in advertising and labeling if the use was lawful prior to the date of the enactment of the act, after a new trade name, design or insignia, is used in the labeling and if such use is 'only of the words Red Cross and only for the purpose of indicating, in lettering smaller than the new trade name, design or insignia that such article formerly was identified by the Red Cross'; and that retailers may be permitted to deal in articles in the labeling of which the Red Cross is used until July 1, 1950." (p. 2)

The Committee summarized the bill (S. 469) which it favorably reported thus:

> "In other words the bill provides, in effect, first, three years' continued use of the symbol by manufacturers; second, three years additional in which to change to a new insignia; and, third, three years after 1947 for retailers to dispose of stocks." (p. 3)

The report concluded as follows:

> "It was the judgment of the committee that the protection of the public against possible deception into

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[6]Report No. 534, 78th Congress, 1st Session, Senate.

> the belief that commodities which were being placed on the market by commercial operators were in fact the product of the American Red Cross Society or endorsed by the American Red Cross Society would warrant the passage of this legislation even if there were no treaty obligations at all." (p. 4)

This bill after a full debate[7] was passed by the Senate, the additional three-year period allowed to the pre-1905 users being increased to six years. After the vote was announced, a motion was made to reconsider, in order to permit of further study. The bill subsequently came up for reconsideration and there was an extended debate[8] on a proposed amendment that the pre-1905 users be permitted to file suit in the Court of Claims for compensation. The amendment was lost and the bill was passed, on a vote of 38 to 28.

This bill then went to the House. The House Committee then had further extensive hearings, during a period from May 23, 1944 to December 8, 1944, taking several hundred pages of testimony. The Committee then reported out the Senate bill favorably, after amending it so as to lengthen the periods for tapering off the use. The bill as so amended provides as follows: (1) continued use of the symbol until July 1, 1950, (2) use until July 1, 1963 in advertising and labeling if a new trade-name is used in such labeling and if the use is only of the words "Red Cross" in lettering smaller than the new trade name for indicating that such article was formerly identified by the

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[7]Congressional Record for Jan. 19, 1944, pp. 387, *et seq.*

[8]Congressional Record for April 24, 1944, pp. 3633, *et seq.*

Red Cross. The Committee report[9] started with a statement of the existing law:

> "Persons, corporations or associations that actually used or whose assignors actually used the Red Cross insignia or words for any lawful purpose prior to January 5, 1905, however, are expressly permitted to continue the use thereof for the same purpose and for the same class of goods. * * *
>
> "It was recognized, however, that under existing law there are legal uses of the symbol by commercial users. The bill as reported therefore gives an opportunity for commercial users gradually to abandon the use of the symbol and name by providing: first, that those who were lawfully entitled to the use of the Red Cross prior to the act of January 5, 1905 for commercial purposes might continue such use until July 1, 1950, and that the manufacturer or producer may have until July 1, 1951 and the retailer until July 1, 1954 to dispose of such articles; second, that during an additional period of 13 years, namely to July 1, 1963, etc. as stated above.

The House adjourned at the end of 1944 before the bill was reached on the calendar.

In the course of the last Committee hearing (pp. 124-125) the fact appeared that a bill (S. 1398) had been introduced[10] in the Senate on September 29, 1943 amending the Red Cross Act to narrow the use by pre-1905 users, and containing the following provision:

"The Federal Trade Commission is authorized and

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[9]Report No. 2054, 78th Congress, 2d Session, House of Representatives.

[10]Representative Johnson thought the bill had passed the Senate, but investigation shows it has not been acted upon.

directed to enjoin violations of this Act subject to the same procedure, appeals, and penalties as now provided in the case of deceptive acts or practices in 'commerce' by Fifty-second Statutes at Large, 11. (15 U.S.C. 45)."

## POINT I.

### THE USE BY THE RESPONDENT OF THE WORDS AND SYMBOL "RED CROSS" IS EXPRESSLY PERMITTED BY CONGRESS, AND THE COMMISSION IS WITHOUT JURISDICTION TO PREVENT SUCH USE.

We are confronted with a question of construction. The Commission does not have the power asserted in this proceeding unless Congress gave it to the Commission. Clearly, Congress could have authorized the respondent to use the red cross words and symbol and refrained from giving the Commission power to prevent such use, or Congress could have given the Commission the asserted power to prevent the use.

We submit that the foregoing facts clearly demonstrate (1) that Congress has retained jurisdiction over dealing with the use of the red cross; (2) that Congress regards the pre-1905 users as having the right still to do so; and (3) that it has refused and still refuses to terminate forthwith and unconditionally the rights of the pre-1905 users.

Three Congressional Committees have just recently labored at length over the problem; they have heard proponents and opponents of the legislation at length; they have had before them representatives of various departments of the Government (including the Department of Justice); and they invited all interested persons to appear. They have considered history, equities and present conditions. Then they arrived at the conclusions set forth in their bills and

accompanying reports. It is apparent that the one thing that Congress will not authorize is the action that the Federal Trade Commission purported to take in this proceeding. If the rights of the pre-1905 users are to be ended, they are to be given a period of time to prepare for it, a further period in which to transfer the good will of their present trade-mark to a new trade-mark, and the rights of dealers must be protected. The position of Congress seems crystal clear—it made an adjustment of conflicting interests in 1910, giving the pre-1905 users the right to continue their use of the words and symbol, and that adjustment continues unless and until Congress changes it; and when Congress makes a new adjustment, it will do so by comprehensive legislation that will take into account the equities of the various rights involved.[11] The conclusion is inevitable that Congress has not given the Commission the power of annihilation it has sought to exercise.

As against this, the Commission advances various arguments which we will proceed to analyze.

A.

First, the Commission suggests that the pre-1905 users did not acquire any rights under the Red Cross Act because the language in question is in the form of a proviso. But as was said by this Court in *McDonald* v. *U. S.*, 279 U. S. 12, 21:

> "Little if any significance is to be given to the use of the word 'provided'. In Acts of Congress, that word is employed for many purposes."

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[11] It will be noted from the Congressional proceedings that, the longer the Congressional Committees studied the problem, the longer they would continue the use by the pre-1905 users and the more generous were the conditions for tapering off.

It is well settled by this Court that in construing Federal legislation the intent of the whole must be determined, and no weight is to be attached to the fact that the clause in question appears as a proviso.

Moreover, the Commission has overlooked the fact that in the codification of the Federal statutes in the United States Code, the word "provided" has been dropped out, as well as the words "by this Act", so that the statute now reads:

> "No person, corporation, or association that actually used or whose assignor actually used the said emblem, sign, insignia, or words for any lawful purpose prior to January 5, 1905, shall be deemed forbidden to continue the use thereof for the same purpose and for the same class of goods." (U. S. C. A., Tit. 36, § 4)

So, until this is repealed or amended, no pre-1905 user "shall be deemed forbidden to continue the use".

Aside from the language employed, Congress itself, the author of the legislation, has placed the matter beyond dispute. The Committee reports all affirmatively assert that the pre-1905 users "are expressly permitted to continue the use". The proposed amendatory statutes uniformly provide "may continue to use". Congress has thus given the authoritative and obvious construction of its own action; it prohibited the commercial use of the words and symbol, except that it authorized the then users to continue their use. Thus Congress has no doubt today that pre-1905 users were authorized and are still authorized to use the words and symbol.

Shortly after the passage of the Red Cross Act, Judge Learned Hand in *Loonen* v. *Deitsch*, 189 Fed. 487 (1911) ruled:

> "Finally, Congress has clearly recognized that fact by permitting all those who prior to 1905 had used the mark lawfully, to continue. * * *.
>
> "* * * Whatever may have been the policy before, Congress has now definitely declared in the proviso of the latter act that it would permit such marks if they antedated 1905. Congress had power so to legalize the use of it; the question of public policy was for it and for it alone, and it is now finally closed."

That opinion has not been attacked or questioned until now and has been generally regarded as authoritative.

B.

We now come to what is apparently the Commission's main argument. It claims that the amendment of 1938 to the Federal Trade Commission Act overrides the proviso of the Red Cross Act. That amendment authorizes the Commission to prevent the use of "unfair or deceptive acts or practices in commerce".

We must first analyze the issue presented. The only "deceptive act" relied on is the mere use of the red cross words and symbol. The Commission complains of no other act or practice as being deceptive except the mere naked use. Hence the Commission's claim is the right of prohibition even if there is nothing but mere use. The Commission's claim is thus not the right to regulate or the right to forbid any act or practice other than mere naked use, but the right to destroy the use peremptorily, for that is all that is involved in this case.

The Court below upheld, and this respondent does not question, the right of the Commission to regulate under the

Federal Trade Commission Act. If any pre-1905 user in connection with his use of the words and symbol is guilty of any unfair or deceptive acts or practices, the Commission has full power to stop such acts and practices. The Court below went even further and held that the Commission could affirmatively order pre-1905 users to take affirmative action in connection with the use, and the respondent has not appealed therefrom. The two Acts should and can be construed together so that both can be given effect. But the Commission will have none of that; its position that it can prevent the mere use is in reality the claim that the amendment of 1938 repeals the proviso in the Red Cross Act, and it should be completely disregarded by the Commission.

We start with the basic principle as stated by Mr. Justice Cardozo in *Baltimore National Bank* v. *State Tax Commission*, 297 U. S. 209, 215:

> "It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling."

It is also pertinent here to quote from the recent case of *McDonald* v. *Commissioner*, 323 U. S. 57, 62, in which the petitioner was advancing a similar argument in another branch of the law:

> "Nothing whatever in the circumstances attending the adoption of §121 of the Revenue Act of 1942 warrants the suggestion that Congress unwittingly initiated a radical change of policy regarding campaign expenditures. * * * It surely is not fair to attribute to Congress the reversal of its policy and the enactment of a far-reaching new policy in the absence of any evidence, however tenuous or specu-

lative, that Congress was legislating on the subject."

No suggestion has been advanced that Congress in amending the Federal Trade Commission Act of 1938 had in mind the Red Cross Act or a reversal of the policy as set forth in that Act.[11a]

The Commission undertakes to avoid these principles by claiming that the two statutes are not in "*pari materia*". But there is no such exception to the general principle; the Commission cites no authority therefor and there is no basis in the reasons underlying the principle for any such exception.[11b]

The Commission's real point is that when Congress passed the Red Cross Act and when Congress recently was considering its amendment, Congress was not thinking of the public interest or the protection of consumers, and that Congress dealt with that matter solely in the 1938 amendment of the Federal Trade Commission Act.

It is certainly a remarkable assumption we are asked to make, that Congress in legislating and fixing a public policy was blind to the public interest. The Commission presents not a shred of evidence to support that assumption and such an assumption cannot be indulged in without strong evi-

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[11a] Admittedly the object of the amendment of 1938 was to change the construction put on the Trade Commission Act by the courts. The courts had held that injury to competitors was a necessary condition to the Commission's action and Congress removed that condition.

[11b] To the contrary see *Louisiana* v. *Mississippi*, 202 U. S. 1, 41. This Court, after finding that the acts admitting Louisiana, Mississippi and Alabama, respectively, were not in *pari materia*, held that a claimant under the last act could not "successfully contend that it changed the earlier act by construction".

dence to support it. But we do not need to rest there; from the language used, as well as from the inherent nature of the problem posed and the solution enacted, it is apparent that the assumption is without foundation.

When Congress incorporated the Society there was a wide use of various crosses in various colors for many purposes. Congress put the words "red cross" into the corporate name of the Society that it was incorporating and provided that its emblem should be a Greek red cross on a white ground. If it had stopped there, there would have been potentialities of real confusion, for the public might deal with persons or buy merchandise using these words and symbol in the mistaken belief that a connection existed with the Red Cross Society. Congress admittedly incorporated the Society, giving it this particular name and this particular emblem in view of the Geneva Conventions and to further its purposes. But there is no justification for the claim that Congress stopped there; Congress could not possibly have been unaware of the wider problem of consumer misunderstanding arising from its selection of words and a symbol that were so commonly used as trade-marks. The language of the Act shows that this is so and dispels any doubt to the contrary.

In Section 4 of the Act of 1905 Congress first made it unlawful for a person falsely to hold himself out as being a member or agent of the Society for the purpose of collecting funds. Then it went on in the next sentence to prohibit the use for the purposes of trade

> "or as an advertisement to induce the sale of any article whatsoever."

In the amendment of 1910 the wording of this section was strengthened but the above-quoted language remained

unchanged.[12] It continued the prohibition against the use for the purposes of trade "or as an advertisement to induce the sale of any article whatsoever". Clearly Congress had in mind that persons might use the words and symbol "to induce the sale of an article" and that the consumer might be misled thereby. Hence the need arose for the adjustment of conflicting interests. Congress might have followed public interest to the complete exclusion of private interests but, in view of the equities of prior users, it adopted the compromise of the "grandfather clause." It was a fair adjustment under the circumstances, that had the virtue from the public interest standpoint of improvement through the certainty that the number of the pre-1905 users would steadily decrease over the years.

The Commission recognizing that the recent proceedings in Congress refuted its argument, attempted to brush aside those proceedings by asserting that Congress was then also not thinking about the consumer but only about the Red Cross Society. It would be remarkable to assume that Congress, having thought so much of the consumer in 1938 that it amended the Federal Trade Commission Act, then proceeded to forget all about the consumer. The record before the Congressional Committees contains abundant material showing that this aspect of the problem was actively before the Committees. Instead of burdening this Court with many references, we need merely quote from the report of the Senate Committee:

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[12]It is further significant that while Section 4 as adopted in 1905 provided, "The fine so collected shall be paid to the American National Red Cross", that provision was wholly eliminated from the 1910 amendment, so that now the violation is a misdemeanor punishable in the Federal courts like any other misdemeanor.

> "It was the judgment of the Committee that the protection of the public against possible deception into the belief that commodities which were being placed on the market by commercial operators were in fact the product of the American Red Cross Society or endorsed by the American Red Cross Society would warrant the passage of this legislation even if there were no treaty obligations at all."

It is noteworthy, particularly in the light of the foregoing, that the bill which accompanied the report authorized the continued use for three years by manufacturers and a further three years for use in connection with a new insignia and three years more to retailers to dispose of their stocks. The Senate increased the second period to six years, and when the bill got to the House, these periods for continued use and for tapering off were even lengthened. Although the Congressional Committees clearly had before them the possibility of deception of consumers, they asserted that the pre-1905 users are "expressly authorized to continue the use of the words and symbol" and proposed to continue that use for some years, with the right of a further limited use to transfer the good will to a new trade mark.

Approaching the matter from another angle, it seems remarkable that during the three years that the proposed amendatory legislation was pending before the Congressional Committees, where the proceedings were wide open to any witnesses and where various Government departments appeared, no one ever suggested that Congress was wasting its time and effort in considering the problem of the repeal or modification of the proviso, since Congress had already virtually repealed it four years before by authorizing the Commission to stop the use of the words

and symbol completely and peremptorily. If the Commission is correct, what an incredible mess Congress was heading into; unwittingly and unwarned it was authorizing the continuance of the use for years, with elaborate provisions for tapering off, when it had already authorized the Commission to terminate the use forthwith. If S. 469 is enacted, must not the Commission consistently claim that it and the Federal Trade Commission Act are not in *pari materia* and hence that it could disregard the later amendment to the Red Cross Act just as it seeks to disregard the original Act? Would the able lawyers in the United States Senate have engaged in extended debate on the propriety of an amendment allowing claims for compensation by the pre-1905 users, if there had been any question or suggestion that these pre-1905 users were employing their trade marks only on the sufferance of the Federal Trade Commission which had been authorized to terminate the use peremptorily? Also, it may be noted that the bill which originated the Congressional proceedings in 1942 looking to the modification or repeal of the proviso was drawn by the Department of Justice.

Of course the Federal Trade Commission was mentioned in the Congressional proceedings, but the way that it was, substantiates our position. We take as typical the excerpt quoted in the brief of the Commission at page 20:

> "The elimination of abuses is within the jurisdiction of the Federal Trade Commission."

That undoubtedly represented the view of the Congressional Committees, just as it accorded with the decision of the Court below. But elimination of abuse is very different from complete prohibition of use. The point was

made before the Committee that if the pre-1905 users abused their right of use, then the Commission could stop such abuse. But it was never even remotely intimated that the Commission had been authorized by Congress to stop the mere use; if such a suggestion had been made, the Committee would unquestionably have asked "Then why are we wasting our time in considering this legislation?"

At another point in the hearings, one of the Committee members suggested that Congress might lay down a principle that the Federal Trade Commission could apply in accordance with the legislative intent. It was then that another member of the Committee pointed out that Senator Barbour had introduced a bill to that effect (S. 1308).[13] These instances and others illustrate that the Congressional Committees were mindful of the Federal Trade Commission but did not regard it as having jurisdiction to solve the problem with which they were wrestling. The statutory provision that the pre-1905 users shall not "be deemed forbidden to continue the use" is regarded by Congress as still in full force and effect, and that is irreconcilably in conflict with the Commission's claim that Congress has authorized it to discontinue the use.

C.

The Commission brings into the case the Geneva Conventions in two ways: first, that the decree of the Commission should be sustained as carrying out the obligations of

[13]See p. 14 *supra*. It will be noted that the portion of this bill quoted to the Committee refers not only to the Federal Trade Commission, but also the "deceptive acts or practices" provisions of the Federal Trade Commission Act.

this country under the Conventions and, second, that Congress in its recent activities probably only had in mind the carrying out of these obligations.

The Convention of 1929 contains the language "the Governments of the High Contracting Parties whose legislation may not now be adequate shall take or shall recommend to their legislatures such measures as may be necessary at all times" to prevent commercial use. To this has been added the provision: "After such going into effect it shall be unlawful *to take out* a trademark or commercial label contrary to such prohibitions". (Emphasis supplied.)

These provisions are obviously not self-executory and it is unnecessary to cite authority to the effect that the implementing of such provisions lies with the Congress and is wholly without the competence of the Federal Trade Commission or any other like body. It is in the sole jurisdiction of Congress to determine what, if any, legislation should be enacted under such a provision, and the action or non-action on the part of Congress is conclusive on the courts, governmental agencies and all other departments of the Government.

There is no doubt that this country's alleged obligation to take some further action under these Conventions was one of the strong reasons originally urged in support of the legislation introduced in 1942 and the bill was cast in such a form that it went to the House Committee on Foreign Affairs. But as the hearings on that point developed it became less and less clear that this country was under any obligation to take further action and that ground finally faded out. In fact, Mr. Bloom, Chairman of the Committee, published a careful, detailed and documented statement, in which he pointed out that the legislation already adopted

by this country had discharged its obligations under the Conventions.[14]

This elimination of the treaty-motif is evidenced in several ways. First, the Convention had similar obligations with respect to the Swiss White Cross as it did with the Greek Red Cross, and the first bills in the House dealt with both crosses. But as the consideration of the legislation progressed, all reference to the White Cross was dropped out, until finally the legislation that was approved by the House Committee in 1944 makes no reference to it. If this legislation was in performance of this country's obligation under the Convention, there would have been no basis for dropping out reference to the Swiss White Cross. Second, the early bill's title was "an Act to implement article 28 of the convention signed at Geneva on July 27, 1929", etc., while the final bill—the one reported to the House on December 11, 1944—amends the title so as to read "An Act to terminate further commercial use of the heraldic emblem of the Red Cross on a white ground formed by the reversal of the federal colors of Switzerland and of the names 'Red Cross' and 'Geneva Cross' as referred to in articles 19 and 28 of the Geneva Convention of 1929". The purpose of implementing the Convention has disappeared.

As we have already shown, these extended hearings before the different Congressional Committees and on the floor of the Senate ranged over all aspects of the problem, and the Committees were far from being unmindful of protecting the consuming public from the potentiality of deception. We need merely conclude with a reference to the quotation from Senator O'Mahoney's committee's report on

[14]Printed at pp. 221 and 222 of the Committee hearings (1944).

page 12, *supra*, that it would favor the bill without regard to the Treaty.

## D.

The Commission seeks support from the argument that the Red Cross Act applies to both interstate and intrastate commerce, while the Federal Trade Commission Act applies only to interstate commerce. The Commission apparently argues that Congress gave it the right to prohibit the use only in interstate commerce, leaving untouched the right to use in intrastate commerce. The result of that argument would be that Congress has divided the pre-1905 users into two classes; those pre-1905 users that employ the trade-mark in intrastate commerce can continue but those that employ it in interstate commerce can be stopped. On what possible theory Congress would make such a distinction is not suggested, and none appears. If Congress in 1938 deemed it necessary to withdraw the authorization given to the pre-1905 users in order to protect the consumer against deception, there seems to be no conceivable reason why the consumer needed to be protected only from an interstate user and not from an intrastate user. It is inexplicable that Congress should have intended indirectly by the amendment to the Federal Trade Commission Act to have repealed the proviso of the Red Cross Act as to interstate uses and left it intact as to intrastate uses.

The facts as developed before the Congressional Committees indicate that there is only a small handful of pre-1905 users still left. But these few survivors, whose existence was called to the attention of the Congressional Committee, are all engaged in interstate commerce. Thus

the question before Congress was what to do about the pre-1905 users who are engaged in interstate commerce, and the obvious understanding of Congress and of everyone else concerned was that these interstate users still continued to have the right to use unless and until Congress took action.

E.

The Commission refers to the case of *Federal Trade Commission* v. *Algoma Lumber Company*, 291 U.S. 67. That decision and its principles have nothing to do with the case at bar. In that case, the respondent companies falsely called their product "white pine" when it was not white pine. The Commission found that they had misnamed their product from the outset and had continued to use this deceptive description, and this Court sustained an order of the Commission directing the respondents to stop calling their lumber white pine when it was not white pine.

The respondent in the case at bar did not adopt a false trade-mark. At a time when crosses of all shapes and colors were still in the common pool for all to use, this respondent in good faith, as did many others, selected for its trade-mark a Greek cross colored red. Eight years later Congress incorporated the Society, put "red cross" into its title and gave it the Greek red cross as a symbol. But even then Congress told the respondent and others similarly placed that they could continue on their way, and they proceeded with the building up of good will and value around their trade-marks. Then over the years the American Red Cross Society, which had been little known and had few members, gradually grew until it had attained a large membership and wide reputation. The situation which the Commission says produces the potentiality of misconception was not created

by this respondent but was caused entirely by the growth of the American Red Cross Society. The trouble that the Commission finds with the situation was not caused by the respondent but was caused by the tremendous growth of a later comer into the field. Congress may feel that a readjustment between public and private rights has become desirable, and when Congress acts it will of course be obeyed. But in the meanwhile Congress' study of the situation has obviously satisfied it that the pre-1905 users have strong equities; that they are not in the class of deceptive business men but they are entitled to careful and considerate treatment.

In the *Algoma* case and like cases cited in Commission's brief, the company was found guilty of having committed the wrong of adopting a false trade-mark or having falsely advertised or branded its goods. This respondent has been found guilty of no wrong, upon analysis of the charges against it. The Commission carefully refrained from finding any impropriety in its original adoption of its trade-mark in 1897, and no such finding would have been justified by the evidence. All it is actually accused of is that it has continued to use a trade-mark properly adopted nearly fifty years ago, with the permission of Congress to continue to use it despite the incorporation of the American Red Cross Society with the Greek red cross as its emblem.

The Committees of Congress have referred to the pre-1905 users as being in "good faith" and said that their use was expressly permitted; and these Committees have consequently spent much time and care to protect the equities of these pre-1905 users. Surely they are not to be lumped for common treatment with those who falsely designate their wares.

Companies which have used the "Red Star" as a trade-mark for years may presently find that their situation is akin to that of this respondent when intercourse and trade with Russia grow to a point where the Russian Red Star is well known in this country; surely some people will be found who will testify that they thought that the Red Star on goods indicated some connection with Russia. Any possible confusion that would arise would in no way be due to those companies, any more than any confusion is due to this respondent. For the Commission to take away their trade-marks or to take away ours is certainly far beyond any principle of law that has yet been recognized. Congress may see fit to deal with their situation in the public interest just as it may see fit to deal with this respondent's. In the meantime the Commission may in these situations take steps to regulate the use, but may not destroy the trade-marks. The courts have recognized that a man by the name of Waterman may go into the fountain pen business, despite the prominence of the Waterman Company, or a man may make and sell cellophane, despite the prominence of duPont & Company, so long as he makes it clear that he is not connected with those companies. Respondent's situation is even stronger, for it adopted its trade-mark not only before the American Red Cross Society attained its prominence but even before the Society was incorporated.

F.

The Commission presents the argument that, if respondent had used some other words or symbol deceptively, the order of the Commission would have been proper. But the argument gets nowhere, as it means too much or too little.

If it refers to a company that adopts a false or deceptive trade-mark or symbol or misbrands or falsely advertises its goods, then a Commission order to cease and desist would be well within the authorities; but that is not this case. If the Commission is talking about a misconception created by respondent, then that is also not this case. This respondent adopted a proper trade-mark fairly and lawfully and has done nothing since that time but use it; any misconception that may exist on the part of purchasers has not been due to it but to happenings over which it had no control. The Commission may have jurisdiction to make adjustments in the situation in the public welfare but the Commission cites no authority or reason for its power to destroy the trade-mark.

If respondent had adopted any proper trade-mark in 1897 and if some other corporation or society incorporated in 1905 had adopted the same trade-mark, then clearly no matter how big or important or dominating the latter became, respondent would not lose its own trade-mark. It is not unknown for two concerns to have similar trade-marks; but the smaller company has never been required to surrender its trade-mark because of the greater prominence that the other company has attained. Here again, the Commission may well have jurisdiction to regulate in the public interest but it would have had no jurisdiction in such a situation to take away the trade-mark of respondent.

Equally beside the point is Commission's further argument that the rights of the pre-1905 users are no greater than they would have been had Congress never enacted any prohibition against the use of the name and symbol. If Congress in incorporating the American Red Cross Society had purported to give it only a non-exclusive right to the

name and symbol, then surely there would have been no basis for the Commission to do what Congress refrained from doing, namely to destroy the trade-marks of the pre-existing users. There is no reason or authority that a company adopting and using a lawful trade-mark should lose it because Congress subsequently creates a corporation with that trade-mark. Conceivably Congress in the public interest might end the use—a power which Congress would exercise with restraint and with provisions that would mitigate hardship. But the Commission would have no jurisdiction to do that which Congress refused to do—to terminate peremptorily the trade-marks of prior users. A corporation, even though incorporated by Congress, has no right to drive out prior users of its trade-mark no matter how big and powerful it may become. If it is to have special rights, it must obtain those rights from Congress. And if the prior users are to lose their rights, it can only be at the command of Congress. As we have said, it may well be within the regulatory jurisdiction of the Commission to make reasonable provision to meet the situation in the public interest, but the Commission has no jurisdiction here to usurp the functions of Congress and terminate the rights of the prior users. In the case at bar we do not have to guess at the intent of Congress; in passing the Red Cross Act it expressly said that it would not stop the use by the pre-1905 users. This has been fortified by the recent Congressional proceedings showing that Congress recognizes that the right of the pre-1905 users still continues and further showing that Congress is unwilling to terminate that right peremptorily. It recognizes them as "good faith" and "lawful" users, and has shown great zeal in protecting their equities.

## POINT II.

### THE ORDER OF THE CIRCUIT COURT OF APPEALS WAS A PROPER EXERCISE OF ITS JURISDICTION.

This Court in the recent case of *Connecticut Company* v. *Federal Power Commission*, 324 U.S. 515, reaffirmed the law to be that when a Federal administrative agency makes its findings of fact on an erroneous legal conception, the case should be referred to it for further proceedings in accordance with the opinion of the Court. In that case the Federal Power Commission had proceeded on the basis of a rule of law which this Court held erroneous and it returned the case to the Court of Appeals with instructions to remand the cause to the Federal Power Commission for further proceedings consistent with its opinion.

The action of the Circuit Court of Appeals in our case falls squarely within that rule. The Federal Trade Commission squarely stated in its findings that the provision of the Red Cross Act "has no application" to the proceeding (R. 49, fol. 145). Its findings of fact and its conclusions were accordingly grounded upon that assumption of law.

Of course, if the respondent is right in its contention that the Commission has no power to terminate its use of the Red Cross, then the Commission obviously proceeded on an erroneous conception of the law. But even without going that far, if the correct rule is merely that both Acts should be considered and the use by respondent not terminated unless necessary to carry out the provisions of the Federal Trade Commission Act, the Commission was still proceeding on an erroneous assumption of the law. It completely disregarded the Red Cross Act, holding its provisions inapplicable and leaving it completely out of account as a

factor to be considered. Therefore the Court below, after pointing out the error of law made by the Commission, remanded the case to the Commission for further proceedings in accordance with the opinion.

In view of the Commission's erroneous view of the law, the Record is completely barren of any evidence as to whether the public interest requires the peremptory and unqualified cessation of the use by the respondent; it does not appear that the Commission even gave that question any consideration. It merely found that the steps that the respondent had taken to prevent any misconception on the part of the public were not sufficient.

The Commission completely disregarded as irrelevant the equities of respondent as a pre-1905 user, despite the consideration and protection that Congress has given to those equities.

Viewing the situation objectively, we find that the Commission has ordered that which Congress after thorough, painstaking consideration has rejected. The Commission has ordered a peremptory, unconditional stoppage; Congress has stated that there is a continuing right to use but, further, has pointed out that, if that user should be stopped, it is compatible with the public interest to bring that about without peremptory unconditional cessation. The report accompanying the bill passed by the Senate pointed out the possibility of deception on the part of the public but nevertheless that bill first permitted the continued use for a period of time and then provided for use for a further period if a new trade-mark is used in such labeling for the purpose of indicating "in lettering smaller than the new trade name, design or insignia that such article was formerly identified by the Red Cross." When the House Committee

reported out this bill it left these conditions unchanged but extended the period to thirteen years. Thus it was the view that even if the rights of the pre-1905 users were to be ended, their use of the Red Cross could be continued under these conditions for extended periods without deception of the public.

It is also pertinent to note that there has been no contention on behalf of the Commission that the average reasonable person would be under any misconception. As a matter of fact, the Record is barren of any proof that any purchaser of the respondent's products bought because of a supposed connection.[15] The Commission did not claim that its witnesses represented a fair cross-section of the community; on the contrary, it appears that witnesses were interviewed in advance by the Commission (e.g. R. 100). All the Commission's witnesses except the first few were led in a way that no court of law would permit: each witness was first asked what the American Red Cross Society meant to him, what the American Red Cross Society did and what was the emblem of that Society; then when the witness had answered "Red Cross" to the last question, he would be shown respondent's label and be asked for his reaction.[16]

A witness, on whom the Commission largely relied, was a lady who also testified that she thought the United States Steel Company belonged to the United States of America and the Wilmington Trust Company to the City of Wilmington (R. 104). Another witness testified that she was

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[15]The Record is bare that any purchaser was even confused except for the evidence of Miss Horty who testified that she once bought two boxes and believed at the time that "it had an attachment with the American Red Cross" (R. 91).

[16]For example, see R. 148, fol. 444. This technique was used with all succeeding witnesses.

under the impression that the Red Cross Society approves all good products (R. 214). The Record demonstrates that any possibility of misconception is very limited, and the danger to the public very small.

In this connection the decision of this Court in *Federal Trade Commission* v. *Royal Milling Company*, 288 U. S. 212, 217, is highly relevant.

> "These names (the trade names of respondent) have been long in use, in one instance beginning as early as 1902. They constitute valuable business assets in the nature of good will, the destruction of which probably would be highly injurious and should not be ordered if less drastic means will accomplish the same result. The orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public. * * * This is a matter which the commission has not considered but which, as the body having primary jurisdiction, it should, in the first instance, consider and determine."

This case remains unchallenged. The Commission suggests that it should be contrasted with the *Algoma* case, *supra*. The *Algoma* case was decided less than a year after the *Royal Milling* case; it refers to the earlier case but in no way undertakes to limit it. The real contrast between the two cases is that in the *Algoma* case the respondent had called its lumber "white pine" when in fact it was not white pine; there was no reason why it should not stop the false labeling of its product. The considerations above quoted from the *Royal Milling* case were absent. The respondent in the *Royal Milling* case used the word "milling" in its trade name when in fact it did not mill. The consideration given to the good will of that company should certainly be given the respondent in the case at bar, which has not even

been guilty of that act or of any act like it. The complaint against the Royal Milling Company was that it improperly put the word "milling" in its trade name when it did not mill; the respondent at bar properly adopted a trade mark that was perfectly lawful and the complaint of the Commission is merely that because of the incorporation and growth of another association long after the event some part of the public may be confused.

In concluding this point, we quote from the opinion of this Court in *Ford Motor Company* v. *Labor Board*, 305 U.S. 364, 373:

> "The statute with respect to a judicial review of orders of the Labor Relations Board follows closely the statutory provisions in relation to the orders of the Federal Trade Commission, and as to the latter it is well established that the court may remand the cause to the Commission for further proceedings to the end that valid and essential findings may be made. * * * The 'remand' does not encroach upon administrative functions. It means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law."

## POINT III.

### THE DECISION OF THE COURT BELOW WAS TOO FAVORABLE TO THE COMMISSION.

Respondent recognizes that it did not apply for certiorari but nevertheless it may point out error in the Court below in order to sustain the judgment.

The Court below, in refusing to dismiss the proceeding relied upon the principles enunciated in the line of cases represented by *Federal Trade Commission* v. *Standard*

*Education Society*, 302 U. S. 112; and *Charles of the Ritz Corporation* v. *Federal Trade Commission*, 143 F. (2d) 676. Those cases dealt with situations in which the respondent had made false representations with respect to its product or had adopted false trade names or trade-marks. Such respondents obviously had no equity in their favor; it did not lie in their mouths to say that no one should have been deceived by their misrepresentations. The man who selects the untruth for dissemination has no equity to protect his wrongful act on the claim that it ought not deceive. Hence in those cases the far-reaching rule was applied that if anyone was deceived, even the credulous or the unthinking, it was sufficient to sustain an order to cease and desist.

But our situation is very different and we have been unable to find that any case such as ours has yet come before the courts for consideration. However, it is entirely probable that the future will see our situation recurring. For example, the hospitalization service known as the "Blue Cross" has grown tremendously in the last few years; it is now said to have twenty million members and it is expected to far outgrow the Red Cross Society. Before long it will be simple to find members of the public who, approached as were the witnesses in our case, will say that the Blue Cross used as a trade-mark on merchandise leads them to believe that the goods have some connection with the hospitalization association. Will that require business concerns which adopted the Blue Cross years ago and have built up a good will around it to abandon their trade-mark? Similarly, the "Green Cross" has been adopted as the symbol of the growing National Safety Council for the elimination of accidents. The same question may well arise in

connection with that trade-mark. Further, we have called attention hereinbefore to the position of those who over the years have adopted the Red Star for their trade-mark and the situation in which they will find themselves when the Red Star of Russia becomes widely known in this country following the increase of intercourse and commerce with that country.

Such concerns have done no wrong. They are not subject to the estoppel which stops a man who adopts an untrue trade name or a misdescription of his wares, claiming that no one should be deceived thereby. We urge that in our case and in the class of cases to which we have above referred no harsher rule should be applied than that the natural and probable result must be deceptive to the ordinary person.

*Pep Boys—Manny, Moe & Jack, Inc.* v. *Federal Trade Com.*, 122 F. (2d) 158, 161;
*Federal Trade Commission* v. *Balme*, 23 F. (2d), 615, 620;
*Caigan* v. *Plibrico Jointless Firebrick Co.*, 65 F. (2d) 849 (1933); Cert. Den. 290 U. S. 668.

Such a test the Commission does not claim to have met, nor has the Court below found that it has met such a test. The Court below used the test of "the unthinking and credulous members of the public." In its brief for certiorari, the Commission speaks of "the careless, ignorant, illiterate or foreign-born". In *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 117, from which the Commission quotes "Laws are made to protect the trusting as well as the suspicious", this Court pointed out:

> "Testimony in the record from citizens of ten States—teachers, doctors, college professors, club women, business men—proves beyond doubt that the practice was not only the commonly accepted sales method for respondents' encyclopedias, but that it successfully deceived and deluded its victims."

It is urged that the business man who adopts his trademark without fault should not be held to the test of the Court below to preserve his property rights against subsequent events over which he has no control—certainly not respondents who are regarded as using in "good faith".

Accordingly, we believe that the Court below should have set aside the order of the Commission, and the Commission is not harmed by the entry of the far more favorable order from which it has appealed to this Court. This respondent did not appeal, for it is content to use its trademark as provided in the opinion of the Circuit Court of Appeals. It is not seeking to be free of reasonable regulation but is resisting unwarranted confiscation of its valuable property rights.

## CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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# SUPREME COURT OF THE UNITED STATES.

No. 320.—October Term, 1945.

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| Federal Trade Commission, Petitioner, *vs.* A. P. W. Paper Company, Inc. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit. |

[May 6, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

Respondent manufactures and sells toilet tissues and paper towels in interstate commerce. On each package or roll of one brand are a Greek red cross and the words "Red Cross". Respondent registered the words "Red Cross" and the Red Cross symbol as a trade mark; and it features them in its advertisements and on its letterheads. By § 4 of the American Red Cross Act of January 5, 1905, 33 Stat. 600, 36 U. S. C. § 4 it was made unlawful "for any person or corporation, other than the Red Cross of America, not now lawfully entitled to use the sign of the Red Cross, hereafter to use such sign or any insignia colored in imitation thereof for the purposes of trade or as an advertisement to induce the sale of any article whatsoever." That section was amended by the Act of June 23, 1910, 36 Stat. 604, 36 U. S. C. § 4. Sec. 4 of that Act made unlawful the use of the Greek red cross on a white ground or the words "Red Cross" for the purpose of trade or as an advertisement "to induce the sale of any article" or "for any business or charitable purpose" by any person other than the American National Red Cross[1] or its duly authorized employees and agents or the sanitary and hospital authorities of the army and navy. It

[1] The Red Cross organization had its origin in a treaty drafted at the Geneva Convention in 1864 and acceded to by the United States in 1882. 22 Stat. 940. The American Association of the Red Cross was incorporated in 1881 under the laws of the District of Columbia. It was reincorporated in 1893 under the laws of the District of Columbia as the American National Red Cross. On June 6, 1900 it was incorporated under the same name by Act of Congress (31 Stat. 277) and was reincorporated January 5, 1905, 33 Stat. 599. From the time of its first incorporation in 1881 down to the present, it has used the words "Red Cross" as a part of its name and has also used the emblem adopted by the 1864 Geneva Convention, the Greek red cross on a white ground.

contained, however, a proviso which reads as follows: "That no person, corporation, or association that actually used or whose assignor actually used the said emblem, sign, insignia, or words for any lawful purpose prior to January fifth, nineteen hundred and five, shall be deemed forbidden by this Act to continue the use thereof for the same purpose and for the same class of goods."

Petitioner's use of the trade name and emblem antedate January 5, 1905.[2] But in 1942 the Federal Trade Commission charged petitioner with a violation of § 5(a) of the Federal Trade Commission Act, 38 Stat. 719, as amended 52 Stat. 111, 15 U. S. C. §45, which makes unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce."

A hearing was had, findings were made and a cease and desist order was issued. The Commission found that "the use by respondent of the words 'Red Cross' and of the mark of the Greek red cross to designate its products has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public in that such name and mark represent or imply that respondent's products are sponsored, endorsed, or approved by the Red Cross; that the Red Cross is financially interested in the sale of the products; that the products are used by the Red Cross; that the products are manufactured in accordance with sanitary standards set up by the Red Cross; or that there is some other connection between the products and the Red Cross. Not only are these, in the opinion of the Commission, reasonable inferences to be drawn from the use of the name and mark, but the record affirmatively shows that the name and mark are in fact so understood and interpreted by many members of the public." The Commission also found that statements on respondent's products that they are made by respondent and that the name and mark are registered "do not serve to correct the erroneous and misleading impression created through the use of the trade name and mark." The Commission entered an order which, among other things, forbade respondent from using the

[2] Toilet tissues were marketed by petitioner under that trade name and emblem since 1897 and paper towels since 1933. The trade-mark was first registered in the Patent Office in 1911 and was extended to cover paper towels in 1934.

The Commission made no finding as to whether the paper towels were of the same class of goods as the toilet tissue within the meaning of the proviso to §4 of the 1910 Act.

words "Red Cross" to describe its products and from displaying the Greek red cross on them.[3] 38 F. T. C. 1.

On a petition for review the Circuit Court of Appeals, by a divided vote, reversed the order of the Commission. 149 F. 2d 424. It held that the order went beyond permissible limits in forbidding any use of the words and the mark. It remanded the case to the Commission for the formulation of a new order which, though not forbidding the use of the words and the symbol, might require statements which would avoid any inference that the goods were sponsored or approved or in any way connected with the American National Red Cross. The case is here on petition for a writ of certiorari which we granted because of the importance of the problem in the administration of the Federal Trade Commission Act.

There is no suggestion that the pre-1905 use of the words and the symbol was an unlawful one within the meaning of either the 1905 or the 1910 Act. Nor has the Commission found that respondent has engaged in any fraudulent activity or made any untruthful statements in connection with its use of the words and the symbol. Therefore this is not a case where the words and symbols were either adopted or used pursuant to a fraudulent design, aimed at creating the impression that these products were sponsored by or otherwise carried the imprimatur of the Red Cross. Hence, here, as in *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. ——, we have no problem involving the power of the Commission to uproot a fraudulent scheme in its entirety. But it is argued that however lawful the earlier use may have been, it cannot survive a finding by the Commission that the use constitutes an unfair or deceptive act or practice in commerce. It is pointed out that the 1938 amendment to the Federal Trade Commission Act gave the

[3] It ordered respondent to cease and desist from

"1. Using the words 'Red Cross' or any abbreviation or simulation thereof, either alone or in combination or connection with any other word or words, to designate, describe, or refer to respondent's products.

"2. Using or displaying on respondent's products or in any advertisement of such products the mark of the Greek red cross, or any other mark, emblem, sign, or insignia simulating or resembling such cross.

"3. Representing in any manner or by any means, directly or by implication, that respondent's products are sponsored, endorsed, or approved by the Red Cross; that the Red Cross is financially interested in the sale of said products; that said products are used by the Red Cross; that said products are manufactured in accordance with sanitary standards set up by the Red Cross; or that there is any other connection between said products and the Red Cross." 38 F. T. C. 3.

Commission power to protect consumers, as well as competitors, against unfair or deceptive practices.[4] It is said that there are no exceptions to that broad power and none should be implied from the Red Cross Act of 1910. The latter Act, it is said, confers no general rights but only a limited immunity and should not be construed as exempting pre-1905 users of the name and emblem from regulatory legislation of general application which Congress may from time to time enact for the protection of the public. It is also argued that by the Geneva Convention of 1929, which was ratified by the United States[5] in 1932, the United States agreed to prohibit the use by private persons of the name and the symbol and that the Red Cross Act and the Federal Trade Commission Act should not be construed in favor of conduct which this nation is under international obligation to terminate.

We agree, however, with the Circuit Court of Appeals. It is clear that the 1910 Act granted, or at least recognized, the right of pre-1905 users to continue the use of the words and the symbol.

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[4] In Federal Trade Commission *v.* Raladam Co., 283 U. S. 643, 647 et seq., the Court had ruled that, "The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree, and this presupposes the existence of some substantial competition to be affected, since the public is not concerned in the maintenance of competition which itself is without real substance." The 1938 amendment to § 5 of the Federal Trade Commission Act was designed to make "the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor." H. Rep. No. 1613, 75th Cong., 1st Sess., p. 3. And see S. Rep. No. 221, 75th Cong., 1st Sess., p. 3.

[5] 47 Stat. 2074. Article 28 provides in part (47 Stat. 2092):

"The Governments of the High Contracting Parties whose legislatures may not now be adequate shall take or shall recommend to their legislatures such measures as may be necessary at all times:

"(a) to prevent the use by private persons or by societies other than those upon which this Convention confers the right thereto, of the emblem or of the name of the *Red Cross* or *Geneva Cross*, as well as any other sign or designation constituting an imitation thereof, whether for commercial or other purposes;

. . . . . .

"The prohibition mentioned in subparagraph (a) of the use of signs or designations constituting an imitation of the emblem or designation of the *Red Cross* or *Geneva Cross*, . . . . shall take effect from the time set in each act of legislation and at the latest five years after the Convention goes into effect. After such going into effect it shall be unlawful to take out a trademark or commercial label contrary to such prohibitions."

[6] The manager of the bill which became the 1905 Act stated on the floor of the House during the debate that it would not "interfere with any lawful right now existing." 39 Cong. Rec. 406.

Judge Learned Hand, speaking of the 1910 Act in Loonen *v.* Deitsch, 192 Fed. 487, 492, stated: "Whatever may have been the policy before, Con-

The House Report stated that the Act as amended "will permit the use of the symbol . . . by such persons, corporations, and associations as actually used the emblem prior to January 5, 1905, for the purposes for which they were so entitled to use it and for the same class of goods. The section, as so amended, grants to the American National Red Cross the fullest protection it is possible to afford it by congressional enactment and at the same time amply protects the concerns possessing vested property rights in the emblem." H. Rep. No. 1256, 61st Cong., 2d Sess., pp. 2-3. It is apparent from the terms of the 1905 Act and the 1910 Act[7] that Congress was concerned not only with protecting the Red Cross against pretenders but also with protecting the public against the false impression that goods purchased were the products of the Red Cross or were sponsored by it. Congress, however, did not go the full distance. It preserved the right of earlier, good faith users to continue the use of the words and the symbol. It may have concluded that the mark which had been acquired was a valuable business asset which should not be destroyed. Or it may have thought that the extent and manner of the use by the established concerns were not likely to injure the public.[8] But whatever the

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gress has now definitely declared in the proviso of the latter act that it would permit such marks if they antedated 1905. Congress had power so to legalize the use of it: the question of public policy was for it and for it alone, and it is now finally closed."

[7] As we have already noted, the 1905 Act made it unlawful "for any person or corporation, other than the Red Cross of America, not now lawfully entitled to use the sign of the Red Cross, hereafter to use such sign or any insignia colored in imitation thereof for the purposes of trade or as an advertisement to induce the sale of any article whatsoever."

And § 4 of the 1910 Act, which we have already summarized, provided:

"It shall be unlawful for any person, corporation, or association other than the American National Red Cross and its duly authorized employees and agents and the army and navy sanitary and hospital authorities of the United States for the purpose of trade or as an advertisement to induce the sale of any article whatsoever or for any business or charitable purpose to use within the territory of the United States of America and its exterior possessions the emblem of the Greek Red Cross on a white ground, or any sign or insignia made or colored in imitation thereof, or of the words 'Red Cross' or 'Geneva Cross' or any combination of these words: *Provided, however*, That no person, corporation, or association that actually used or whose assignor actually used the said emblem, sign, insignia, or words for any lawful purpose prior to January fifth, nineteen hundred and five, shall be deemed forbidden by this Act to continue the use thereof for the same purpose and for the same class of goods."

[8] Judge Learned Hand in Loonen v. Deitsch, *supra*, note 6, p. 489, stated: "Does the mark actually mean that the society is in any way concerned with the manufacture of the goods? I think not. We have become

purpose, the fact remains that the good faith use of the mark by the pre-1905 users was intended to be preserved unimpaired.

We cannot lightly infer that this specific right was intended to be swept away under the 1938 amendment to the Federal Trade Commission Act. Repeals by implication are not favored. Yet if the order of the Commission stands, the right granted or recognized by the 1910 Act becomes a nullity. For the use of the words and the symbol by good faith pre-1905 users becomes *per se* unlawful. As the 1910 Act, like the Federal Trade Commission Act, was in part directed towards protection of the public against deceptive practices, we think the two Acts must be read in *pari materia*. The problem is to reconcile the two, if possible, and to give effect to each. We think that may be done by recognizing that while the good faith use of the words and symbols by pre-1905 users is permissible, the Commission may require the addition of language which removes any misleading inference that the products are in fact sponsored, approved, or in any manner associated with the American National Red Cross.

We need comment only briefly on the Geneva Convention of 1929, which was ratified by the United States in 1932.[9] The undertaking "to prevent the use by private persons" of the words or symbol is a matter for the executive and legislative departments. The problem has been before the Congress in recent years.[10] No action has

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familiar with it in the past for many other uses than that of the Society, though happily such uses will now slowly disappear. It has been used on hospital ambulances, upon medicaments, upon doctors' motor cars, upon barber shops, upon laundries, and for military field service not connected with the Red Cross Society. In short, until the legislation of 1905 (Act Jan. 5, 1905, c. 23, 33 Stat. 599 [U. S. Comp. St. Supp. 1909, p. 1038]), it had been quite instinctively adopted for many uses which were congruous with the chief objects of the society, but which did not indicate that the society had anything to do with them, or certainly with the frequency of the use ceased to do so. Finally, Congress has clearly recognized that fact by permitting all those who prior to 1905 had used the mark lawfully to continue."

[9] See note 5, *supra*.

[10] In the 77th Congress a bill to eliminate over a period of years the exemption given to pre-1905 users was favorably reported by the Committee on Foreign Affairs of the House. H. Rep. 2387, 77th Cong., 2d Sess. This proposed legislation was designed to discharge the obligation of the United States under the Geneva Convention of 1929. *Id.*, pp. 1, 2, 4.

In the 78th Congress a bill passed the Senate with similar provisions. 90 Cong. Rec. 398, 401, 3656. It was reported favorably, with amendments, by the Committee on Foreign Affairs of the House. H. Rep. No. 2054, 78th Cong., 2d Sess. This proposed legislation was likewise designed to discharge the obligation of the United States under the Geneva Convention of 1929. *Id.*, pp. 4-6. And see 90 Cong. Rec. 399.

yet been taken. But we can find in that inaction no basis for concluding that the rights of good faith, pre-1905 users granted or recognized by the 1910 Act are today in any way impaired. Indeed, the existence of that right was recognized as giving rise to the need for additional legislation.[11] That assumption can hardly be reconciled with the conclusion that complete relief is already accorded under the Federal Trade Commission Act.

We do not undertake to prescribe the order which the Commission should enter. The fashioning of the remedy is a matter entrusted to the Commission, which has wide latitude for judgment. *Siegel Co. v. Trade Commission*, *supra*. We only hold that under the facts of this case the Commission may not absolutely forbid the use of the words and the symbol by respondent.

*Affirmed.*

Mr. Justice JACKSON took no part in the consideration or decision of this case.

[11] See H. Rep. No. 2387, *supra*, note 10, pp. 2, 3; H. Rep. No. 2054, *supra*, note 10, pp. 4-6. In the latter Report it was, indeed, recognized "that under existing law, there are legal uses of the symbol by commercial users." p. 4.